Supreme Court, U.S.
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No. 10-374

IN THE
Supreme Court of the United States

LISA M. ZURESS,

Petitioner,

v.

MICHAEL B. DONLEY, SECRETARY,
UNITED STATES DEPARTMENT OF THE AIR FORCE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner Lisa M. Zuress respectfully submits this Supplemental Brief to address recent filings in two other pending petitions for certiorari.

The petition in this case presents the following question: In what circumstances are dual-status technicians protected by federal statutes prohibiting employment discrimination? As the petition explains, that question encompasses two issues. First, does *Feres v. United States*, 340 U.S. 135 (1950), bar some or all statutory employment discrimination claims by dual-status technicians? Second, should *Feres* be overruled?

Briefing has now been completed on a subsequently filed petition, No. 10-638, *Wetherill v. McHugh*, which also addresses an employment discrimination claim brought by a dual-status technician. The petition in *Wetherill* presents the first issue raised by the petition in *Zuress*, but does not ask this Court to consider overruling *Feres*.

Another subsequently filed petition, No. 10-885, *Witt v. United States*, presents the question whether *Feres* should be overruled in whole or in part. That petition has been accompanied by extensive *amicus curiae* support. The government's response in *Witt* is presently due to be filed on March 25, 2011, although it is virtually certain that the Solicitor General will secure an extension of that time.

The three simultaneously pending petitions together establish that this Court should now grant certiorari to decide both the application of *Feres* to employment discrimination claims brought by the nation's more than 70,000 dual-status technicians, as well as the further question whether *Feres* should be

overturned. The application of *Feres* to dual-status technicians has bedeviled the lower courts and created an unsustainable legal regime in which a Title VII claim may be adjudicated by the EEOC but not reviewed by the federal courts. Further, this Court should finally resolve the recurring controversy over whether *Feres* is correctly decided.

Each of the three petitions is an appropriate vehicle in which to resolve the important question(s) it presents. Petitioner accordingly urges this Court to grant review in one or more of the three cases.

To the extent this Court would find it expedient to resolve the issues in a single case, the petition in *Zuress* presents both. In *Zuress*, the Court can thus appropriately first decide whether to overrule *Feres* (the issue presented in *Witt*) before turning (if necessary) to whether *Feres* prohibits some or all employment discrimination claims brought by dual-status technicians (the issue presented in *Wetherill*).

Alternatively, the Court could grant review in multiple cases and consolidate them for disposition together. That course would be appropriate, for example, if the Court concluded that it would be beneficial to have before it the application of *Feres* in multiple contexts. *Witt*, for example, involves a medical malpractice claim brought by a servicemember who was injured while on leave from the military. *Zuress* and *Wetherill*, by contrast, involve claims arising from the federal prohibition enacted by Congress in Title VII, rather than from a state-created tort duty. To the extent that this Court were to consider applying the *Feres* doctrine differently with respect to causes of action that arise under federal statutes, granting certiorari in the different types of cases might be appropriate.

As a courtesy, we are serving a copy of this Supplemental Brief on counsel to the petitioner in both *Wetherill* and *Witt*.

For the foregoing reasons, the Court should grant certiorari in one or more of the pending petitions in this case, *Wetherill*, and/or *Witt*.

Respectfully submitted,

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